Brief in Support of Petition for Writ of Certiorari

I.

Reference to Opinion of Court Below

The opinion of the Circuit Court of Appeals was rendered February 19, 1941, and is reported in 117 F (2d) 943. Record P. 423.

II.

Statement of Grounds of Jurisdiction

Jurisdiction of this court is asserted under the judicial code, Sections 240 and 262, as amended, U. S. C. A. Title 28, Sections 347 and 377; Chapter 4 Section 24 C, Bankruptcy Law, as amended, Chandler Act (11 U. S. C. A. 47), and Rule 37 of this court.

III.

Statement of the Case

Inasmuch as a full statement of the case, insofar as the facts are material to a consideration of this petition, has been given in the petition for certiorari under the heading "Statement of the Case", in the interest of brevity that statement is not repeated at this point.

IV.

Specifications of Errors Intended to Be Urged

The errors commited by the Circuit Court of Appeals in its decision which are urged as a basis for consideration of this petition are:

(1) The procedure followed in the trial of the case, sanctioned by the Circuit Court of Appeals, in which

the master specifically allowed that part of the Petitioner's claim in the sum of $7,440.00 (R 241-B) (the court in the decree confirmed the allowance by the master (R 394-B, R 263-B)) and to which claim no objection was raised by the Petitioner or any other party, and to the very close of the case the claim stood as an allowed claim, and then after the case was closed the master in his final report, notwithstanding the fact that his claim had been allowed, determined that the Petitioner, not having produced evidence to establish the bona fides of the acquisition of his claim, could not complain of the discrimination of the plan against him, was such a departure from the usual and accepted judicial procedure as to deny the Petitioner his property without due process of law.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court.

(3) The lower court and the U. S. Circuit Court of Appeals failed to follow the decisions of the court of last resort of the State of Florida in determining whether or not the Petitioner was "authorized by law" as required by the Municipal Bankruptcy Act (11 U. S.C.A. 403(6)) to carry out the provisions of the plan of composition.

(a) The part of the plan comprising the "fiscal agency" is illegal and void.

(b) The plan authorizing the payment of the fees and expenses of the "fiscal agency" from funds specifically set up for the bondholders is contrary to the decisions of the court of last resort of the State of Florida.

(c) That part of the plan authorizing the fees and

expenses of the "fiscal agent" to be paid from funds collected under authority of Article XII Section Eight of the Constitution of the State of Florida, is contrary to the Constitution and the decisions of the Supreme Court of the State of Florida.

(d) That part of the plan authorizing the fees and expenses of the "fiscal agent" to be paid from the "B. P. I. Homestead Levy Fund" (funds collected from properties exempt from all taxation by the Homestead Amendment to the Florida Constitution in 1934) is contrary to the decisions of the Supreme Court of the State of Florida.

(4) The decision of the United States Circuit Court of Appeals in confirming the lower court's determination of the sufficiency of proof to substantiate a plea of res adjudicata, is contrary to the law of Florida as announced in the decisions of the Supreme Court of the State of Florida.

Argument

Point I.

The procedure followed in the lower court and sanctioned by the Circuit Court of Appeals was such a departure from the usual and accepted custom of judicial proceedings as to deny the Petitioner his property without due process of law.

Upon the filing of the composition proceedings in the lower court, the Petitioner filed a sworn proof of claim showing himself to be the owner of $12,510.00 in par amount of coupons being composed in the com-

position proceedings (R 62/63-B). The Board, through its attorney, filed a written objection as to $5,070.00 in face amount of coupons owned by the Petitioner (R 58-A), and on the first day of the hearing he raised this same objection (R 98-B) and the master sustained it. It made no objection to the other part of the Petitioner's claim in the sum of $7,440.00, and the master specifically allowed that part of the claim (R 98-B, 241-B, 263-B). (The judge in the interlocutory decree confirmed the master's allowance of the claim as a claim of the Petitioner (R 394-B, R 263-B). *After the allowance of that part of Petitioner's claim in the sum of $7,440.00, no person asked for a reconsideration of it during the entire trial and to the very end of the case the claim stood as an allowed claim.* After the close of the case and on his final report, the master recognized that Petitioner's claim had been allowed (R 239-241-B), but determined that because the Petitioner had not explained the bona fides of the acquisition of his claim, he had no standing in court to object to the discrimination of the plan against him (R 239-B).

The Circuit Court of Appeals sanctioned the procedure of the lower court and determined that the Petitioner had failed to sustain the burden devolved upon him to establish the bona fides of the acquisition of his claim.

The court, through the master, by the allowance of Petitioner's claim in the sum of $7,440.00, determined that without further proof of the claim it would participate in the plan of composition.

In Re Barrett & Co., 27 F (2d) 159

Rhodes v. Elliston, 29 F (2d) 737

International Agric. Corp. v. Cary, 240 F. 101, 153 C.C.A. 137

Gleason v. Thaw, 234 F. 570

Petitioner's claim, on its allowance, became res adjudicata between the parties in the bankruptcy proceedings.

Hargadine Etc. Co. v. Hudson, 122 F. 232 (C. C.A. 8)

Sterns, Etc. Co. v. Hammond, 217 F. 559, 564 (C.C.A. 6)

Breit v. Moore, 220 F. 97 (C.C.A. 9)

Ullman, Stern & Krausse v. Coppard, 246 F. 124 (C.C.A. 5)

In Re Small Shoe Co., 5 F (2d) 956 (C.C.A. 2)

Lewith v. Irving Trust Co. (1933) 67 F (2d) 855

In Lewith v. Irving Trust Co., supra, the court said (Learned Hand speaking):

> "Such an allowance has all the substantial elements of a judgment, and has the effect of a judgment; it is res adjudicata between the parties, not only in other suits, but in the bankruptcy proceedings themselves."

Thus, to the very moment that the case closed, Petitioner's claim in the sum of $7,440.00 stood as an allowed claim.

The rule is firmly established that an objection to a claim participating in a plan of composition must be in some sufficient manner to assert a particular defense.

In Re Weidenfeldt, 277 F. 59

In Re Two Rivers Wooden Ware Co., 199 F. 877, 118, C.C.A. 325

This objection, however, must be interposed prior to the allowance of the claim.

In Re Tower Magazines, 16 F. Supp. 894

In Re Pipe Railing Construction Co., 6 F. Supp. 71

In Re Two Towers Wooden Ware Co., 199 Fed. 877

But, to make no objection whatsoever to the allowance of Petitioner's claim, stand by silent when it is allowed by the master, making no move during the entire proceedings to have the allowance of the claim re-examined so that, as far as the accepted custom of judicial proceedings at the close of the case, the claim stood as an allowed claim; then, after the case was closed and at a time when it was impossible for the Petitioner to put into testimony any evidence showing the bona fides of his acquisition of the claim (which the Petitioner could have done and can do at the present time) to determine that he had no standing to object to the discrimination of the plan against him, patently denied the Petitioner his property right to be heard in the case, in controvention of the Fifth Amendment to the Constitution of the United States.

Sanders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163, 1165, 37 S.Ct. 638

Snyder v. Mass., 291 U.S. 128, 78 L.Ed. 689, 54 S.Ct. 330, 90 A.L.R. 575

Bandim Petroleum Co. v. Superior, 284 U.S. 8, 19, 76 L.Ed. 136, 144, 52 S.Ct. 103, 78 L.Ed. 826

Georgia R. & Electric Co. v. Decatur, 295 U.S. 165, 79 L.Ed. 1365, 1370, 55 S.Ct. 701

It is clear that the lower court in determining that it was unnecessary for the Petitioner to explain the acquisition of his claim, and then after the case was over and at a time when it was impossible for him to make such explanation, to condemn him for not making such an explanation, certainly deprived him of one of the fundamental rights guaranteed by the Constitution of the United States—an opportunity to be heard before he is condemned. It is respectfully submitted that this point alone is entirely sufficient for this court to give the Petitioner the relief asked for.

Point II.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the U. S. as announced in American United Life Insurance Co. v. Avon Park, 85 L.ed. 112; Case v. Los Angeles Lumber Co., 308 U. S. 106.

The Supreme Court of the United States in the case of American United Life Insurance Co. v. Avon Park, 85 L.ed. 112, specifically pointed out that any such "fiscal agency" contract should be passed upon by the courts in determining whether or not a plan of composition should be confirmed, the court saying as to the fiscal agency contract:

> "It is, however, a relevant inquiry to be made by the district court, as, if and when another plan of composition is presented which directly or indirectly involves any such fiscal agency contract."

The opinion of the Circuit Court of Appeals con-

firming the interlocutory decree in this case states, as to the Petitioner:

> "More than 74% of the creditors have assented to it and have affirmatively approved it and the exercise of no legal right which he could assert would have availed to defeat the plan of composition."

The Supreme Court of the United States in Case v. Los Angeles Lumber Co., 308 U. S., 114, 115, 84 L.ed. 119, and in American United Life Insurance Co. v. Avon Park, 85 L.ed. 112, squarely enunciated the rule that a bankruptcy court is no ministerial register of the votes of the various creditors; that a plan of composition must satisfy *all* of the requirements of the act before it can be confirmed; that an acceptance by the requisite majority is no substitute for the other mandatory requirements of the act. It is respectfully submitted that the mere fact that in the instant case 74% of the creditors had accepted the plan is no indication of whether or not the plan complies with the other mandatory provisions of the act. This is particularly true in the present case, when under the decisions of the Supreme Court of the State of Florida, the plan is plainly illegal. The mere fact that 74% of the creditors (12% being represented by a corporation of which the fiscal agent is President) approve an illegal plan definitely does not mean that the other 26% of the creditors must take it.

Point III.

The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the State of Florida in determining that the Board of Public Instruction was "authorized by law" as re-

quired by the Act (11 U.S.C.A. 403 (e) (6)) to carry out the provisions of the plan of composition.

This court, in Bekins v. Lindsay Strathmore Irrigation District, 308 U. S. 27, 49, 82 L.ed. 1137, 1143, specifically pointed out that:

> "It should also be observed that Chapter X Sec. 83(e) provides as a condition of confirmation of a plan of composition that it must appear that the petitioner 'is authorized by law to take all action necessary to be taken by it to carry out the plan' and, if the judge is not satisfied on that point as well as on the others mentioned, he must enter an order dismissing the proceedings. *The phrase 'authorized by law' manifestly refers to the law of the State* (11 U.S.C.A. 403)." (Emphasis added)

Consequently, the district court and the circuit court of appeals fell completely in error in a determination that the Board "was authorized by law" to carry out the plan, when under the decisions of the Supreme Court of Florida, every phase of the fiscal agency has been declared illegal and void. Each particular part of the plan, and its patent illegality, under the decisions of the Supreme Court of Florida, are herein particularly pointed out:

(1) The plan authorizing the "fiscal agency" is illegal and void.

Taylor v. Williams, 195 So. 175, 184, 142 Fla. 402

W. J. Howey Co. v. Williams, 195 So. 181, 184, 142 Fla. 415

Taylor v. Williams, 196 So. 214, 142 Fla. 756

Motes v. Putnam County, 196 So. 465, 143 Fla. 134

State v. City of Fort Myers, 198 So. 814, adv. op.

The plan of composition provided that the "fiscal agent", under his contract with the Board, was to perform all acts necessary in carrying out the plan of composition, including the furnishing of attorneys, the validating opinion of attorneys, the printing of the new bonds, and all other services in issuing the refunding bonds. For this service the Board of Public Instruction agreed to pay him twenty (20) per cent of the amount of the interest coupons discharged by the proceeding (approximately $35,000.00). The Board of Public Instruction of Broward County, Florida, is a quasi corporation, having very limited powers (see Appendix, page 43). It was created as a means of carrying out the provisions of the Constitution relating to the funds for the public free schools of Florida, as set forth in Article XII Sections Eight and Nine of the Constitution of the State of Florida. Obviously, any such contract as is attempted to be confirmed in this proceeding is absolutely illegal, ultra vires and void. The Supreme Court of Florida has consistently struck down similar contracts and has refused even to allow and *Board of Public Instruction* of Lake County, Florida, to be re-imbursed for fees and expenses already paid to a refunding agent under a contract similar to the one in this proceeding.

In the case of Taylor v. Williams, 195 So. 175, a refunding agent had entered into a contract with Lake County, Florida, to act as its fiscal agent in and about the consummation of a refunding plan. The agent in that case was to perform the same duty imposed on the refunding agent in the case at bar. The similarity of the two cases is herewith shown:

Taylor v. Williams, 195 So. 175, 142 Fla. 756:

"That first party (R. E. Crummer & Company) shall defray all expenses incident to assembling and exchanging the bonds herein proposed to be refunded, printing the said refunding bonds, the representation of Second Party (the county commissioner) in legal proceedings to validate said refunding bonds, obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First Party; all other expenses in connection herewith which may be approved by First Party."

Board of Public Instruction for Broward County, Florida:

Broward County refunding agent shall pay all expenses of plan of composition, attorneys fees for refunding agent, attorneys fees for validation of bonds, court costs, depositary fees, costs of printing bonds, approving attorney's opinion, and all costs expended or to be expended in formulating and carrying out this plan of composition or any amended plan, and exchanging the refunding bonds. (R. 354-B) (R. 16-A)

In the first opinion by the Supreme Court of Florida in Taylor v. Williams, supra, in which case a taxpayer had asked for an injunction to restrain the Board from carrying out the contract, the court referred to the refunding agent's contract, and said:

"Is the new 2 percent refunding agreement dated August 7, 1939, complained of in the Taylor bill (Taylor Record, page 43) void, and should its performance have been enjoined?"

The court then observed that in issuing bonds to be paid by taxation the official duties of the county com-

missioners include the function of providing for the legal fiscal matters; that the law does not contemplate the employment of a fiscal agent to act for a county in managing or controlling official functions in issuing refunding bonds, and said:

> "Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. Pierce v. Isaac, 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.
>
> "The refunding resolutions and contracts are not in accord with law, and the bill of complaint should not have been dismissed."

In the companion case of W. J. Howey Co., et al., v. Williams, 195 So. 181, the court said:

> "The law contemplates that all official authority, duties and functions shall be exercised and performed by duly commissioned officers; the delegation of official authority, duties or functions by officials to non-officials is not permitted by the laws of this State."

A second petition for rehearing was filed (the first petition for rehearing having been denied, 195 So. 184) in which an attempt was made to have the court modify its former opinion so that fees illegally paid could be recovered. In the opinion on the petition for rehearing it was specifically pointed out that the *Board of Public Instruction* of Lake County had also entered into a refunding contract with R. E. Crummer and Company, having duties similar to that of the refunding agent

in this case. The duties of the fiscal agent with the *Board of Public Instruction of Lake County* were also held to be illegal (196 So. 214):

> "That under the terms of the said refunding contract the board of county commissioners, on behalf of the County of Lake and of said road district, and the *board of public instruction*, on behalf of said school districts, agreed to pay said refunding agency, or R. E. Crummer & Company, two per cent on the par value of all bonds refunded in exchange for refunding bonds in consideration of accomplishing said refunding schemes and the employment and payment of counsel to approve the refunding bonds, and the employment and payment of counsel to refund the county or taxing districts severally in proceedings brought to validate the bonds of said taxing units severally."

* * *

The opinion further pointed out that the Board had already paid part of these fees, saying:

> "That at like periods the *Board of Public Instruction* of said county paid said refunding agency more than $13,000.00 as refunding fees. That since the dates aforesaid, further sums have been paid or caused to be paid by said board of county commissioners, and said Board of Public Instruction as refunding fees either to the members of said refunding agency or to R. E. Crummer & Company, or their nominees, aggregating large sums of money." (Emphasis ours)

* * *

In refusing to modify its first opinion, the court said:

> "Ad valorem taxes levied for, and taxes allocated

to county and road and bridge district bond payments can not legally be used for refunding bond expenses, or commingled with revenues raised to pay bond expenses."

Again, in Motes v. Putnam County, (196 So. 465), supra, the court specifically reiterated its previous holding that such refunding contract was illegal and contrary to the laws of the State of Florida.

There is absolutely no difference in the contract that R. E. Crummer & Company had with the Board of Public Instruction of Lake County, which was struck down by the Supreme Court of Florida, supra, and the case at hand. The principle is precisely the same in both cases.

(2) (a) *Payment of fees and expenses of fiscal agent from funds set up for bondholders, is illegal and void.*

Pierce v. Isaac, 135 Fla. 101, 184 So. 669

Motes v. Putnam County, 196 So. 465

Taylor v. Williams, 196 So. 214

The Supreme Court of the State of Florida has specifically passed upon the question of whether or not a fiscal agent's fee can be hidden in a fund set up for the holders of refunding bonds, and subsequently paid from the taxes reportedly levied for these refunding bonds. In Pierce v. Isaac, supra, the Supreme Court of the State of Florida struck down a similar provision, in which the fees for the refunding agent were to be paid from the interest and sinking fund set up for the

refunding bondholders. This law was again reiterated and firmly established in the case of Taylor v. Williams, 195 So. 175, where the court said:

> "Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. Pierce v. Isaac, 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.
>
> "The refunding resolutions and contracts are not in accord with law, and the bill of complaint should not have been dismissed."

Moreover, the very cases in which the Supreme Court validated the bonds to be issued under this proceeding, Bryan v. Board of Public Instruction for Broward County, 195 So. 697; 195 So. 698; 195 So. 699, the court specifically pointed out on page 697 that funds set up for bondholders could never be used for refunding agent's fees. Also in Taylor v. Williams, 196 So. 214, the Supreme Court on a petition for rehearing and for a modification of its original opinion said:

> "Ad valorem taxes levied for and taxes levied to county and road and bridge district bond payment *can not legally be used for refunding bond expenses or commingle with funds raised to pay bond expenses.*"

(b) *Payment of fees and expenses of fiscal agent from funds collected under authority of Article XII, Section Eight of the Constitution of Flori-*

da, is contrary to the Constitution of Florida and decisions of the Supreme Court of Florida.

State v. L'Engle, 40 Fla. 392, 24 So. 539

State v. Board of Public Instruction for Indian River County, 90 Fla. 1152, 125 So. 357

Board of Public Instruction v. Kennedy, 109 Fla. 153, 147 So. 250

Barrow v. Moffett, 95 Fla. 111, 116 So. 71

Bryan v. Board of Public Instruction for Broward County, 197 So. 698, 197 So. 699

Under the provisions of the scheme of refunding as proposed by the refunding agent in his plan of composition, it was provided that the fees and expenses incurred by him in performing the various duties set out by him should be paid from the proceeds of taxes levied for the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund" over a period of five years (R. 16, 17-A) (R. 354-B). These two funds (R. 19-A) are set up for the benefit of the refunding bondholders, and are the proceeds of a part of the ten mill tax levy imposed under the authority of Article XII Section Eight of the Constitution.

That funds raised under Article XII Sections Eight and Nine of the Constitution (See Appendix Page 47 for constitutional provision) can never be diverted from the schoool fund to pay such fees as have been incurred under the illegal contract entered into with the refunding agent is squarely and firmly imbedded in the adjudicated decisions of the Supreme Court of Florida. Those funds must remain inviolate for the benefit of the

public free schools, and they can never be diverted to any purpose other than the operation of such public free schools in the county. State v. L'Engle, 40 Fla. 392, 24 So. 539; State v. Board of Public Instruction for Indian River County, 90 Fla. 1152, 125 So. 357; Board of Public Instruction v. Kennedy, 109 Fla. 153, 147 So. 250. The Supreme Court of Florida, in State v. L'Engle, supra, referred to the funds collected under authority of Article XII of the Constitution, and said:

> "The school fund has been segregated by the constitution from the general county funds, and *must be levied for this distinct purpose.* Whatever burdens of county taxation can be imposed for such purpose must be in aid of and constitute a part of the county school fund, and *no authority can be given to direct it from the objects specified in the constitution.*" (Emphasis ours)

Moreover, the case of Barrow v. Moffett, 95 Fla. 111, 116 So. 71, presents a situation precisely similar to that now attempted by the scheme set forth in the refunding agent's plan. In that case, the Board of Public Instruction of Highlands County, Florida, attempted to validate bonds to raise funds to pay the outstanding *floating indebtedness* of the Board of Public Instruction of that County. The bonds were to be paid from "a part of the tax provided for by the 'section (12)' of the Constitution of the State of Florida". In that case the attempted authority to issue the bond for the payment of the floating indebtedness came from a specific act of the legislature of the State of Florida; in this case the authority to levy taxes for the purported indebtedness incurred by the board in and about its contract with the fiscal agent (to be paid over a period of five

years) is found in the provisions of the plan of composition (R. 17-A); moreover, the agent's fee and expenses are to be paid from the proceeds of taxes provided for by Article XII of the Constitution of the State of Florida, as were the bonds in the case of Barrow v. Moffett, supra. The situation is precisely as if the sum of Thirty-Five Thousand Three Hundred Sixty-Two and 92/100 Dollars ($35,362.92), being the amount of the fiscal agent's fees and costs, were to be paid by the issuance of a series of bonds payable from a part of the tax provided for by Article XII of the Constitution of the State of Florida, and payable serially over a period of five years. The Supreme Court of Florida, in Barrow v. Moffett, supra, said that even when authorized by an act of legislature, such similar procedure would be illegal and unconstitutional:

> "The statute cannot be sustained, since Sections Eight and Nine of Article XII expressly and specifically provide that the funds collected as taxes under Section Eight, shall be used 'for the support of the public free schools' in the county (Section Eight) and 'solely for the maintenance and support of public free schools' (Section Nine)" . . .
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> * * *
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> "The act here considered purports to authorize bonds to be issued to pay 'an outstanding indebtedness incurred in the support and maintenance of the public free schools of said county, evidenced by warrant, notes, open accounts, or otherwise incurred for *services* and/or labor performed, materials, and/or supplies furnished and for money loaned to and received by the Board of Public Instruction' the bonds to be paid from 'a part of the

> tax provided for by Section 12 of the constitution.' The constitution contemplates the payment when due of expenses for maintenance and support of schools, and does not contemplate the issue of bonds to pay for past indebtedness." (Emphasis ours)

There is absolutely no difference whatsoever in principle between paying the indebtedness incurred under the refunding agent's contract from school funds levied under the authority of Article XII Section Eight of the Constitution over a period of five years, and issuing bonds for this same indebtedness and having the bonds paid over the same period of five years. *If the one is illegal, as in Barrow v. Moffett, supra, so is the other, as contemplated under the Plan.*

If the Board of Public Instruction could not legally issue serial bonds maturing over a period of five years to pay this purported indebtedness incurred in its contract with the refunding agent (which is clearly illegal) even if it were attempted to be validated by an act of the legislature, as in Barrow v. Moffett, supra, how can it possibly be said that the board "would be authorized by law" to pay the same indebtedness over a period of five years without the issuance of bonds, but acting under the authority of the provisions of a plan of composition, particularly when the Municipal Bankruptcy Act itself requires the Petitioner to "be authorized by law to take all action necessary to be taken by it to carry out the plan"? (11 U. S. C. A. 403 (e) (6)) That such a plan is illegal was specifically pointed out in the opinion validating the bonds to be issued hereunder (page 697) where the Supreme Court of Florida referred to the general school fund, saying that it could

never be used for any other purpose other than for the schools and for repaying this indebtedness:

* * *

> "And the use of any other portion of the general school fund of Broward County for the purpose of payment of interest on the refunding bonds, *including refunding expenses* . . . 'would not be authorized unless by a vote of the people'."

Obviously, the payment of the purported indebtedness to the refunding agent from funds pledged to the public free schools is contrary to the specific provisions of the Constitution of the State of Florida, particularly Article XII Sections Eight and Nine, but if the contract can not be legally consummated, then the board is not "authorized by law to take all action necessary to carry out the provisions of the plan" as required under 11 U. S. C. A. 403 (d) (6).

(c) *Payment of fees and expenses of fiscal agent from taxes levied on properties exempt by the Homestead Amendment to the Florida Constitution from all taxation (from the "B. P. I. Homestead Levy Fund") is prohibited by the Constitution of the State of Florida.*

State v. City of West Palm Beach, 127 Fla. 849, 174 So. 337

City of Coral Gables v. State, 128 Fla. 874, 176 So. 43

Groves v. Board of Public Instruction for Manatee County, 109 F. (2d) 522

The court was patently in error when it determined that taxes could be levied against properties exempt under the Florida Homestead Amendment from all taxation, for the purpose of paying the purported indebtedness incurred by the board by its illegal contract with the fiscal agent.

Under the plan of composition (R. 17-A) provision was made that the costs and fee of the refunding agent should be a lien upon and be paid from the two funds set up for the bondholders, the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund". In the interlocutory decree, the court referred to and ordered the Board to pay the sum of Thirty-Five Thousand Three Hundred Sixty-Two Dollars and Ninety-Two Cents ($35,362.92) "from the 'B. P. I. Bond Fund' and the 'B. P. I. Homestead Levy Fund' set up in the plan of composition, the above mentioned fees and expenditures". (R. 406-B). The two funds, the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund", are separate and distinct funds. The "B. P. I. Bond Fund" is a fund collected only from taxes levied upon all properties not exempt by the Homestead Amendment for taxation. The "B. P. I. Homestead Levy Fund", as stated in the plan (R. 15-A.):

> "shall be composed of the proceeds of a 10 mill levy under Section Eight of Article XII of the Constitution of Florida, *levied against the assessed valuation of homestead property in Broward County, Florida* . . . " (Emphasis ours)

Thus it is that the "B. P. I. Homestead Levy Fund" is limited to that property which was and is exempt by the Constitution of the State of Florida under Article

X, Section Seven, from all taxes except special assessments. The unrefunded bonds having been executed and issued prior to the passage of this amendment, obviously carry the same pledge to them in the new refunding bonds. State v. Clearwater, 125 Fla. 73, 169 So. 60; Folks v. Marion County, 121 Fla. 17, 163 So. 298; 102 A. L. R. 659; Flaming v. Turner, 122 Fla. 200, 165 So. 353; State v. West Palm Beach, 127 Fla. 849, 174 So. 337. As to any such new indebtedness or bonds issued for indebtedness incurred subsequent to this Homestead Amendment (1934), all of that property, and particularly that property referred to in this plan as "homestead property" is not taxable therefor, and any tax imposed on such property for it is void and contrary to the Constitution of Florida. In attempting to impose a tax against this homestead exempt property in the plan of composition for the refunding agent's fees and costs incurred under his purported contract, signed May 2, 1939, years after the passage of the Homestead Amendment, clearly violated the Florida Constitution, and the Board is not authorized by law to carry out a plan having such provisions incorporated in it.

The City of West Palm Beach, Florida, in State v. City of West Palm Beach, 127 Fla. 849, 174 So. 337, attempted to issue refunding bonds to pay off a floating indebtedness of the City, incurred subsequent to the passage of the Homestead Amendment to the Constitution of the State of Florida. The lower court validated the refunding bonds, but on an appeal, the Supreme Court of Florida refused to validate the new bonds observing that when refunding bonds constitute extensions of the old indebtedness, homesteads would

naturally be liable for taxes to service the new bonds, but as to new indebtedness, created after the passage of the amendment, the court said:

> "This condition, however, does not apply to the funding bonds issued to fund a floating debt as to which there was no prior contract for tax levies. These bonds and interest certificates constituted a new and independent contract for the payment of which the levy of a tax upon homesteads is prohibited under Section Seven Article X, of the Constitution (as added in 1934)."

Moreover, this proposition was firmly enunciated again in City of Coral Gables v. State, 128 Fla. 874, 176 So. 43, when that unit attempted to refund certain judgments and open accounts incurred subsequent to the passage of the Homestead Amendment. The lower court refused to validate that part of the indebtedness representing such judgments and open accounts, because homesteads would have been taxes to pay such refunding bonds. On an appeal to the Supreme Court of Florida, that court referred to the West Palm Beach decision, and said:

> "In the decision of State v. West Palm Beach, 174 So. 334, this court reversed a decree of the trial court validating refunding bonds for the purpose of refunding a floating debt. A part of the floating debt embraced a stated account similar to the one here involved. We held that the refunding bonds and interest certificates, sought to be issued and validated, constituted a new and independent contract for the payment of which the levy of a tax upon homesteads was prohibited by Section Seven, Article X of the Constitution. The facts and the charter provisions here are not ma-

> terially different. It therefore follows that the trial court in this case correctly held that the stated account could not be used as a basis for refunding bonds, supported by a levy against a homestead, exempt under Section Seven, Article X of the Constitution."

Moreover, in the case of Groves v. Board of Public Instruction for Manatee County, 109 F. (2d) 522, a mandamus was directed to the board, commanding it to make available funds to pay a judgment rendered on bonds issued by the *Board of Public Instruction of Manatee County, Florida.* The defense made was that the Homestead Amendment had been passed and that the levy could be made only against non-exempt homestead property. It was pointed out in that case that homestead property (the property referred to in the plan of composition as the "homestead Levy Fund") *was exempt even from taxation levied for the support of the public free schools:*

> . . . "and under the Homestead Amendment, Section Seven, Article X of the Florida Constitution, homesteads up to the value of $5,000.00 were exempt from any tax levied for the support of the public free schools."

If bonds had been issued by the Board of Public Instruction to pay the fees and expenses of the refunding agent, and these bonds were to be re-paid over a period of five years from the "B. P. I. Bond Fund" and from the "B. P. I. Homestead Levy Fund", it is obvious that a taxpayer could (1) enjoin the issuance of these bonds; and (2) enjoin the levy of any taxes for the payment of the bonds, because such levy of taxes and the issuance of any bonds would run afoul of the Homestead

Amendment to the Constitution of Florida. That a plan of composition could not be confirmed when such is the case was particularly pointed out in American United Life Insurance Company v. Avon Park, Florida (supra). The court, in that case, said:

> "Under Section 83(e)(6), 11 U.S.C.A. Sec. 403 (e)(6), the court must be satisfied that the city 'is authorized by law to take all action necessary to be taken by it to carry out the plan' before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds *or the levy of assessments therefore.* The courts below did not pass on the applicability of these recent Florida decisions to this fiscal agency contract since they were decided after the Circuit Court of Appeals affirmed the order of confirmation. Nor do we undertake to decide the question in view of our disposition of the case. *It is, however, a relevant inquiry to be made by the District Court as, if and when another plan of composition is presented, which directly or indirectly involves any such fiscal agency contract.*" (Emphasis ours)

It is patent that the indebtedness incurred under the contract with the fiscal agent can not be paid, even if it were authorized to be paid from any school fund, from levies upon properties which are exempt from all taxations under the authority of the Homestead Amendment. *Those properties are even exempt from all levies for maintenance and support of the public free schools.* It is hard to understand how the master fell into such error, in not recognizing this obvious illegality of the plan. For this obvious illegality in the plan, if for no other reason, the Board was not authorized by law "to

take all action necessary to be taken by it to carry out the plan," as required under 11 U. S. C. A. 403 (e) (6).

Point IV.

The decision of the Circuit Court of Appeals in sustaining the objection by the Board to part of Petitioner's claim is contrary to the decision of the Supreme Court of Florida.

It will be observed that the special master disallowed that part of the Petitioner's claim in the sum of $5,070.00 in face amount of coupons which had been objected to by the Board. He allowed the other part of Appellant's claim in the sum of $7,440.00. The only evidence the master had before him in determining that the Turner suit was res adjudicata was the verdict and judgment in that case. The record affirmatively shows that there was no showing that the Petitioner was in privity with the plaintiff in the Turner case. The complete file in the Turner suit was not submitted in evidence to substantiate the objection based on res adjudicata, although the then attorney for this Petitioner specifically objected to the introduction of any part of the Turner case without the complete file. The record reads:

"The Master:

Are you offering in evidence the entire file?

Mr. Ross:

Not the entire file.

The Master:

Or just a part of the file that you are substituting copies for?

Mr. Ross:

I am introducing the originals of exhibits of which I have made copies.

Mr. Warren:

I object to this if the Court pleases because it doesn't give the entire record."

The master overruled the objection and allowed the verdict and judgment to be placed in evidence. In answer to the contention of the attorney for the Appellant that the whole file should be submitted, the master said (R. 85-B):

"The Master:

It is my feeling about it that the final judgment would be sufficient. Objection overruled. Admitted in evidence. (Emphasis ours)

"(Said true copy of verdict, final judgment, petition to remove exhibits, order allowing withdrawal of exhibits, receipt for exhibits, and mandate of the Circuit Court of Appeals in case of N. A. Turner as Trustee vs. Board of Public Instruction for Broward County, was admitted in evidence as Petitioner's Exhibit No. 3)."

No other evidence was introduced by the Board to show that the judgment in that case barred the Appellant from pursuing his claim, nor was there any evidence to show that he was in privity with the plaintiff in that case.

That the Master was completely in error in allowing the introduction of the judgment without the complete file hardly admits of argument. Bell v. Niles, 61 Fla. 114, 55 So. 392; Clem v. Meserole, 44 Fla. 234, 32 So. 815, 103 Am. S. R. 145.

In the case of Bell v. Niles (Fla.), supra, exactly the same question was raised. There a defendant to substantiate a plea of res adjudicata attempted to introduce a judgment of a former case between the same parties, without introducing the complete file. The plaintiff objected to the introduction of the judgment without the whole file being placed in evidence. The trial court sustained the objection and thereupon the case was appealed to the Supreme Court of Florida, and that court pointed out (55 So. page 395):

> "No extended discussion of this assignment is necessary. The proferred judgment was properly excluded, if for no other reason, though such ground was not specifically urged, that under our holding in Little Brothers v. Barlow, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249, 'In order to sustain the contention of *res judicata,* the *complete* record in the former suit, including the judgment therein should be produced, and not incomplete or detached portions thereof.' See also Foot v. Glover, 4 Blackf. (Ind.) 313, there cited and, 23 Cyc. 1538." (Emphasis by the court)

So, also, Clem v. Meserole (Fla.), supra, and where the court said:

> "Under the decisions in this State it is clear that a judgment entry alone, unaccompanied by any other part of the record of such judgment, or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact

> of its rendition, is inadmissible if seasonably objected to."

it further observed:

> "A party is entitled to have the whole record, so far as it concerns the formal stages, produced, because such record is a material part of the judgment, and because he has a right to insist that the presumptions applicable to judgments of courts of general jurisdiction shall be applied only when it is ascertained from an inspection of the whole record that it does not affirmatively appear therefrom that the court did not have jurisdiction to render the judgment."

Manifestly, the ruling of the Master in allowing the introduction of the verdict and judgment in the Turner case was complete error. It proved nothing. It did not show that the issues in that case were the same, as those of the appellant. This, of itself, it is submitted, is sufficient to completely destroy any attempt thus made on the part of the Board to relieve itself from the payment of this part of its indebtedness by hiding behind a plea of res adjudicata. If the Master had ruled correctly and in accordance with the rule clearly enunciated in the two Florida cases cited above, no evidence would be in the record whatsoever to substantiate his findings. And even if that evidence now in the record be considered, it is insufficient, as a matter of law, to substantiate the plea of res adjudicata.

Conclusion

In conclusion, we respectfully submit:

(1) That the procedure followed in the lower court and countenanced by the Circuit Court of Appeals

patently denied this Petitioner of his fundamental right to be heard in the case; that the action of the lower court in determining at the very outset of the case that his claim would be allowed, no objections being interposed thereto and to the very end of the case, his case standing as an allowed claim, and then after the case was closed to determine that because he had not sustained the burden of proof in showing the bona fides of the acquisition of his claim, was such a departure from the usual and accepted custom of judicial proceedings as to deny this Petitioner his property without dues process of law;

(2) The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the United States and of the State of Florida in determining whether or not the Petitioner was "authorized by law" to carry out the provisions of the plan of composition;

(3) The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the State of Florida in determining that an objecton to a part of Petitioner's claim, based upon a plea of res adjudicata, had been sustained.

Respectfully submitted,

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